July 2003

Update: Criminal Procedure Monograph 6—Pretrial Motions (Revised Edition)

6.14 Motion to Determine Defendant's Competency to Stand Trial

7. Maintaining the Defendant's Competence Through the Use of Psychotropic Drugs

Insert the following case summary on page 22 immediately before the beginning of Section 6.15:

In limited circumstances, the United States Constitution "permits the Government to administer antipsychotic drugs involuntarily to a mentally ill criminal defendant — in order to render that defendant competent to stand trial for serious, but nonviolent, crimes." *Sell v United States*, ___ US ___, ___ (2003). The Supreme Court framed the issue in *Sell* as follows:

> "Does forced administration of antipsychotic drugs to render [the defendant] competent to stand trial unconstitutionally deprive him of his 'liberty' to reject medical treatment?" ___ US at ___.

The *Sell* Court's decision was guided by two previous Supreme Court cases involving administering drugs to an inmate against the inmate's will. In *Washington v Harper*, 494 US 210, 221 (1990), the United States Supreme Court recognized that an individual possesses a "'significant' and constitutionally protected 'liberty interest' in avoiding the unwanted administration of antipsychotic drugs." However, forced administration in *Harper* was justified by "legitimate" and "important" state interests, including the constitutionally sound state interest of treating a prison inmate with serious mental illness who poses a danger to himself or others, when that treatment is in the inmate's best medical interests. ___ US at ___. In *Riggins v Nevada*, 504 US 127, 134-135 (1992), the Court indicated that only an "essential" or "overriding" state interest could overcome an individual's constitutional right to decline the administration of antipsychotic drugs. The *Riggins* Court cautioned that an analysis of the competing interests (the defendant's right to deny medication and the state's interest) must include

determinations that the medication was "medically appropriate" and "essential" to the safety of the defendant or others. ___ US at ___.

On the facts of the *Sell* case, where the defendant's offenses were primarily nonviolent, but where the defendant verbally threatened to harm a specific individual, the *Sell* Court held:

> "[T]he Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests." ___ US at ___.

The *Sell* Court predicted that cases permitting the forced administration of antipsychotic medication *solely* for trial-competence purposes would be rare due to the government's high burden of proof to justify medication solely for the sake of the defendant's competence to stand trial. The Court suggested that alternative grounds in support of forced drug administration (health and safety issues, potential for harming self or others, etc.) be explored before attempting to obtain permission on the basis of the defendant's competence to stand trial. ___ Mich at ___.

6.20 Motion for Substitution of Counsel for Defendant or Motion to Withdraw as Counsel for Defendant

Insert the following case summary before Section 6.21 on page 40:

A defendant's Sixth Amendment right to counsel includes the defendant's right to retain the counsel of his or her choice, even when the defendant's primary counsel wishes to join co-counsel from outside the state on a *pro hac vice* basis. *People v Fett*, ___ Mich App ___, ___ (2003). In *Fett*, the defendant was charged with OUIL or UBAL. Because the defendant had two prior alcohol-related convictions within the past ten years, conviction of either of the charges or the lesser-included offense of OWI would result in a felony conviction. ___ Mich App at ___.

Commenting that "[i]t is a simple OUIL case, and I am sure [defendant's Michigan counsel] has tried many cases on OUIL," the trial court denied the defendant's timely request to admit *pro hac vice* an attorney licensed in Ohio to assist the defendant's Michigan attorney at trial. ___ Mich App at ___. The Michigan Court of Appeals reversed the trial court's ruling and held that "a trial court may not arbitrarily and unreasonably refuse to grant admission pro hac vice of an otherwise qualified out-of-jurisdiction attorney." ___ Mich App at ___. The Court further held that the trial court's denial of the defendant's request was a structural and constitutional error mandating automatic reversal. ___ Mich App at ___.

6.28 Motion to Suppress the Fruits of Illegal Police Conduct

Insert the following language after the first paragraph on page 64:

In *People v Clay*, ___ Mich ___, ___ (2003), the Michigan Supreme Court upheld the defendant's conviction of assaulting a corrections officer, even though the conviction for which the defendant was imprisoned at the time of the assault was later overturned. Because on appeal the evidence on which his initial conviction was based was suppressed as the fruit of an unconstitutional traffic stop and subsequent search, the defendant argued he was not "lawfully imprisoned" as required by the plain language of the statute penalizing assaults on corrections officers. The Supreme Court framed the issue simply:

> "The issue presented is whether the reversal of defendant's conviction of the concealed-weapon offense, effectuated by an application of the exclusionary rule, means that defendant was not 'lawfully imprisoned' as contemplated by MCL 750.197c." ___ Mich at ___.

In affirming the defendant's assault conviction, the Court discussed the scope of a police officer's statutory authority to arrest a person who commits a felony in the officer's presence. In *Clay*, the police officer observed the defendant with a concealed weapon for which he had no permit; therefore, the officer was authorized to arrest and imprison the defendant on that basis. According to the *Clay* Court,

> "[A] subsequent determination concerning a defendant's prosecution cannot and does not serve to retroactively render 'unlawful' the actions of a law enforcement officer where those actions are authorized by law.
>
> "Rather, for purposes of MCL 750.197c, an imprisonment cannot be *un*lawful where a law enforcement officer has been given the authority under law to imprison the individual. Because defendant was detained pursuant to the officer's legal authority under MCL 764.15(1)(a), he was 'lawfully imprisoned' under MCL 750.197c." ___ Mich at ___ (emphasis in original).

6.36 Motion to Suppress Evidence Seized Pursuant to a Defective Search Warrant

Insert the following case summary on page 87 immediately before Section 6.37:

In a consolidated appeal involving evidentiary issues arising from the execution of a bench warrant in one case and the execution of a search warrant in the other, the Michigan Supreme Court held that the exclusionary rule does not apply to evidence obtained as a result of statutory and court rule violations having no constitutional implications.

In *People v Hawkins*, ___ Mich ___, ___ (2003), the defendant moved to suppress evidence obtained pursuant to a search warrant based on an affidavit that failed to satisfy the statutory requirements of MCL 780.653(b) for an affiant's reliance on unnamed sources. In deciding that the exclusionary rule did not apply to the evidence obtained in *Hawkins*, the Court overruled in part its previous ruling in *People v Sloan*, 450 Mich 160 (1995), the case on which the Court of Appeals relied in its disposition of the case. In *Sloan*, the "Court held that evidence obtained under a search warrant issued in violation of §653 must be suppressed," and the Court of Appeals affirmed the trial court's order suppressing the proceeds of the search warrant ___ Mich at ___. The *Hawkins* Court disagreed with the earlier *Sloan* analysis and held:

> "[W]here there is no determination that a statutory violation constitutes an error of constitutional dimensions, application of the exclusionary rule is inappropriate unless the plain language of the statute indicates a legislative intent that the rule be applied." ___ Mich at ___.

The Court predicted that some statutory violations would be of constitutional magnitude, and the exclusionary rule would likely be appropriate to suppress any evidence obtained from warrants issued on inadequate affidavits. However, the Court concluded that

> "[n]othing in the plain language of §653 provides us with a sound basis for concluding that the Legislature intended that noncompliance with its affidavit requirements, standing alone, justifies application of the exclusionary rule to evidence obtained by police in reliance of a search warrant." ___ Mich at ___.

In *People v Scherf*, sub nom *People v Hawkins*, ___ Mich ___, ___ (2003), the defendant was arrested after his probation officer petitioned the court for an arrest warrant when the defendant failed to comply with the terms of his probation. The defendant claimed the arrest warrant was invalid (and the evidence seized incident to the arrest should be suppressed) because the probation officer's petition failed to satisfy the affidavit requirement of MCR

3.606(A), the court rule governing contempt proceedings for violations occurring outside the court's presence.

The Court reached the same decision in *Scherf* as it did in *Hawkins*, and for the same reasons. The Court concluded that nothing in MCR 3.606(A)'s plain language indicates that the exclusionary rule was intended to apply to violations of the court rule's affidavit requirement.